Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-4-94
EDGAR JOSEPH JR, CHONG SIEW FAI AND WAN ADNAN FCJJ
27 JANUARY 1995

Bankruptcy *— Adjudication order — Annulment — Whether Official Assignee can apply to set aside order on ground that another earlier order still subsists — Discretion of court — Bankruptcy Act 1967 ss 8(1), 49(1) & (2)*

Bankruptcy *— Practice and procedure — Subsequent bankruptcy — Setting aside — Whether petitioner's failure to conduct bankruptcy search fatal — Effect of Official Assignee's failure to object at hearing of petition — Whether Official Assignee subject to estoppel*

The appellant had obtained a receiving order and an adjudication order ('the orders') against its debtor, Tan Beng Liang ('the debtor'). However, unknown to the appellant, the debtor had already been adjudicated a bankrupt two years earlier ('the first bankruptcy'). The respondent, the Official Assignee, applied to the senior assistant registrar to set aside the orders on the grounds that the orders should not have been granted as the debtor's first bankruptcy was still subsisting and that the appellant's debt could be proved in that bankruptcy. It was not disputed that a copy of the bankruptcy petition was served on the Official Assignee and that neither he nor his representative appeared in court at the hearing of the petition when the orders were made. The senior assistant registrar refused to set aside the orders and the respondent appealed to the High Court. The judge held that since a receiving order had been made and was in force, no further action could be commenced against the debtor without the leave of court by virtue of s 8(1) of the Bankruptcy Act 1967 ('the Act') and set aside the orders on the ground, inter alia, that no search had been made by the appellant prior to the presentation of the petition. The appellant has appealed.

Held, allowing the appeal:

(1) Section 8(1) of the Act deals with the effect of a receiving order as opposed to an adjudication order and restricts the remedies against the property or person of the debtor in respect of any debt provable in bankruptcy except as directed by the Act or with leave of court. On the other hand, s 49(1) and (2) of the Act permit subsequent receiving orders and adjudication orders to be made against an undischarged bankrupt.

(2) The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion for both are generally the same. All relevant facts and circumstances must be considered and where

A the court of first instance has exercised its discretion, a strong case would be required to induce the appellate court to interfere.

(3) The failure to conduct a bankrupty search, per se, is not fatal to the petition but is a factor to consider. The Official Assignee could have taken steps to dismiss the petition but did not. As the B appellant had acted in good faith without knowledge of the prior existing orders, the Official Assignee should not be allowed to complain. That the Official Assignee was amenable to the law of estoppel was beyond question.

C **[Bahasa Malaysia summary**

Perayu telah mendapat suatu perintah penerimaan dan suatu perintah penghukuman ('perintah itu') terhadap penghutangnya, Tan Beng Liang ('penghutang itu'). Bagaimanapun, tanpa pengetahuan perayu, penghutang itu telah dihukum bankrap dua tahun terdahulu ('kebankrapan pertama'). Responden, Pegawai Pemegang Harta, telah D memohon kepada penolong kanan pendaftar untuk mengetepikan perintah itu atas dasar bahawa perintah itu tidak seharusnya diberikan kerana kebankrapan pertama penghutang itu masih lagi berkuatkuasa dan hutang perayu boleh dibuktikan dalam kebankrapan tersebut. Tidak dipertikaikan bahawa satu salinan petisyen kebankrapan itu E telah disampaikan ke atas Pegawai Pemegang Harta dan bahawa beliau mahupun wakilnya tidak hadir di mahkamah pada pendengaran petisyen itu apabila perintah itu dibuat. Penolong kanan pendaftar tidak mengetepikan perintah itu dan responden telah membuat rayuan kepada Mahkamah Tinggi. Hakim telah memutuskan bahawa oleh kerana suatu perintah penerimaan telah dibuat dan masih F berkuatkuasa, tindakan selanjutnya tidak boleh dimulakan terhadap penghutang itu tanpa kebenaran mahkamah mengikut s 8(1) Akta Kebankrapan 1967 ('Akta itu') dan telah mengetepikan perintah itu atas dasar, antara lain, bahawa suatu pencarian kebankrapan tidak dibuat oleh perayu sebelum petisyen itu dikemukakan. Perayu telah G membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Seksyen 8(1) Akta itu berkaitan dengan kesan sesuatu perintah penerimaan berbanding dengan suatu perintah penghukuman H dan menyekat remedi terhadap harta atau orang penghutang itu berkenaan dengan mana-mana hutang yang boleh dibuktikan dalam kebankrapan itu kecuali sebagaimana yang diarahkan oleh Akta itu atau dengan kebenaran mahkamah. Sebaliknya, s 49(1) dan (2) Akta itu membolehkan perintah penerimaan dan penghukuman kemudiannya dibuat terhadap si bankrap yang I belum menyelesaikan hutangnya.

(2) Kuasa untuk membatalkan suatu perintah penerimaan dan suatu perintah penghukuman tertakluk kepada budi bicara hakim dan prinsip yang mempengaruhi penggunaan budi bicara itu adalah

pada amnya sama bagi kedua-dua perintah tersebut. Semua fakta dan keadaan yang relevan mesti dipertimbangkan dan di mana mahkamah pertama telah menggunakan budi bicaranya, suatu kes yang kukuh diperlukan untuk memujuk mahkamah rayuan supaya bercampur tangan.

(3) Kegagalan untuk menjalankan suatu pencarian kebankrapan, per se, tidak membawa padah kepada petisyen itu tetapi merupakan suatu fakta untuk dipertimbangkan. Pegawai Pemegang Harta boleh mengambil langkah untuk membuang petisyen itu tetapi tidak berbuat demikian. Oleh kerana perayu telah bertindak dengan suci hati tanpa pengetahuan tentang perintah terdahulu yang masih wujud, Pegawai Pemegang Harta tidak seharusnya dibenarkan membuat aduan. Hakikat bahawa Pegawai Pemegang Harta itu tertakluk kepada undang-undang estopel tidak dapat dipertikaikan.]

Notes

For cases on adjudication orders, see 1 *Mallal's Digest* (4th Ed) paras 962–965; [1993] Mallal's Digest 71–72.

Cases referred to

Betts, ex p Betts, Re [1897] 1 QB 50 (refd)
Carr, Re (1886) 35 WR 150 (refd)
Caughey, ex p Ford, Re (1876) 1 Ch D 521 (refd)
Davidson, Re [1894] WN 210 (refd)
Debtor (No 446 of 1918), Re A [1920] 1 KB 461 (refd)
Debtor (No 994 of 1935), Re A, ex p The Debtor v Official Receiver [1936] 1 All ER 794 (refd)
Debtor (No 12 of 1970), Re A, ex p Official Receiver v The Debtor [1971] 1 All ER 504 (refd)
Dunn (A Bankrupt), Re, ex p Official Receiver v Dunn [1949] Ch 640; [1949] 2 All ER 388 (folld)
Meggy v Imperial Discount Co Ltd (1878) 3 QBD 711 (refd)
Morgan v Knight (1864) 33 LJCP 168 (refd)
Roberts, ex p Watson, Re (1879) 12 Ch D 380 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 6(3), 8(1), 40(1), (2), (3), 49(1), (2), 78, 80, 105(1)
Bankruptcy Rules 1969 rr 17A, 93, 99(3), 136, 152
Bankruptcy Act 1914 s 39(1), (2) [UK]

KL Wong (*KL Wong & Lim*) for the appellant.
Noorin bte Badaruddin for the respondent.

Chong Siew Fai FCJ (delivering the grounds of judgment of the court): This is an appeal by the petitioner against the decision of the High Court

in Seremban reversing the order of the senior assistant registrar who refused the motion of the Official Assignee to rescind and annul the receiving order and the adjudication order made against the debtor, Tan Beng Liang. The effect of the decision of the High Court was that the receiving order and the adjudication order were set aside. On 3 October 1994, we heard and allowed the appeal with costs to be paid out of the estate of the debtor. The said two orders were restored. Here are our reasons.

The facts are simple. On the petition of the appellant, a receiving order was made and the debtor was adjudged a bankrupt on 27 December 1990. By a notice of motion dated 30 January 1993, the Official Assignee sought to set aside the receiving order and the adjudication order on the ground that the debtor had already been declared a bankrupt on 9 January 1989 in bankruptcy matter No 26–163–1989 by another petitioner and that the debt of the appellant against the debtor could be proved in bankruptcy No 26–163–1989 aforesaid. The learned judge grounded his decision in that since a receiving order had been made and was in force, no further action could be commenced against the debtor without the leave of court by virtue of s 8(1) of the Bankruptcy Act 1967 (hereinafter referred to as 'the Act').

Section 8(1), however, deals with the effect of a receiving order (as opposed to an adjudication order), and restricts the remedies against the property or person of the debtor in respect of any debt provable in bankruptcy or the right to proceed with or commence any action or other legal proceeding in respect of such debt 'except as directed by this Act' or 'with the leave of the court'. The term 'debts provable in bankruptcy' is described in s 40(1), (2) and (3) of the Act which reads as follows:

> (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.
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> (2) A person having notice of any act or bankruptcy available against the debtor shall not prove under the receiving order for any debt or liability contracted by the debtor subsequent to the date of his so having notice.
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> (3) Save as provided in subsections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

Before us, whilst counsel for the appellant contended that the appellant's debt in question was not provable, counsel for the respondent argued otherwise. The materials before us, however, were insufficient for considering the issue.

In contrast to s 8(1) which, as stated above, relates to a receiving order, s 49(1) and (2) of the Act, on the other hand, renders the making of a subsequent receiving order and an adjudication order against an undischarged bankrupt permissible. Section 49(1) and (2) reads as follows:

(1) Where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order, the Official Assignee shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable in the last preceding bankruptcy against the property of the bankrupt in the subsequent bankruptcy.

(2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt, or in the event of an order being made for the administering in bankruptcy of the estate of a deceased bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the Official Assignee in that bankruptcy, without knowledge of the presentation of the subsequent petition) vest in the Official Assignee on account of the subsequent bankruptcy or administration in bankruptcy as the case may be.

The equivalent of our s 49(1) and (2) in the English law is s 39(1) and (2) of the Bankruptcy Act 1914. It must be noted that even prior to 1914, a second or subsequent adjudication order may, on a creditor's petition, be made against an undischarged bankrupt in respect of liabilities incurred after the date of the receiving order in the prior bankruptcy. See *Re Roberts, ex p Watson* (1879) 12 Ch D 380, CA; *Morgan v Knight* (1864) 33 LJCP 168 though the court may, in its discretion, refuse to make a further receiving order if it is satisfied that there is no probability of any assets being available for administration under the subsequent bankruptcy. See *Re Betts, ex p Betts* [1897] 1 QB 50, CA.

The learned judge also stated that no search had been made by or on behalf of the appellant before presentation of the petition. Past experience had shown (and this was not disputed by counsel for the Official Assignee) that there had been instances when the registries or the relevant sections of the Official Assignee's offices had been unable to advise as to whether a particular debtor had already been adjudged a bankrupt. In any event, the failure to search, per se, is not necessarily fatal to the petition but is a factor to consider.

One of the ways a bankruptcy may be disposed of is by annulment. Section 105(1) of the Act provides, inter alia, two situations under which an annulment may be granted:

(1) where in the opinion of the court the debtor ought not to have been adjudged bankrupt, or

(2) where the debts are paid in full.

The first situation is relevant in our case. And, in considering whether a receiving order ought to have been made, the appellate court would consider the actual state of affairs at the date of the order and would, generally speaking, not take into account matters that had occurred after that date. In *Re Dunn (A Bankrupt), ex p Official Receiver v Dunn* [1949]

Ch 640; [1949] 2 All ER 388, CA, Sir Raymond Evershed MR said ([1949] Ch 640 at p 646; [1949] 2 All ER 388 at p 392):

> I think counsel for the Official Receiver is right in saying that, in judging whether the order ought to have been made, the court is entitled to have regard to the actual state of affairs at the date of the order, which may appear from evidence subsequently filed, and certainly would not appear from the bare statement on the formal petition which alone was before the court when the order was made. I do not think, however, that one is entitled, in determining whether the order ought to have been made under the first limb of the subsection, to take into account facts which have occurred after the date of the order.

The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion are, broadly speaking, the same. See *Re A Debtor (No 446 of 1918)* [1920] 1 KB 461 at p 465 applied in *Re A Debtor (No 12 of 1970), ex p Official Receiver v The Debtor* [1971] 1 All ER 504. All the relevant facts and circumstances must be considered. Where the court of first instance has exercised its discretion, a strong case would be required to authorize or induce the appellate court to interfere. See *Re Davidson* [1894] WN 210; *Re Carr* [1886] 35 WR 150; *Re A Debtor (No 994 of 1935), ex p The Debtor v Official Receiver* [1936] 1 All ER 794. In this regard, it is unfortunate that in the present case some of the relevant documents were not included in the appeal record, for example, the bankruptcy petition, the notes of proceedings before the senior assistant registrar and the orders made. Be that as it may, it was not disputed that a copy of the bankruptcy petition was served on the Official Assignee and that neither he nor his representative appeared in court at the hearing of the petition when the orders were made.

The Bankruptcy Rules 1969 requires the transmission or supplies of documents, receiving and adjudication orders to the Official Assignee. See, for example, rr 17A, 93, 99(3), 136 and 152. The Act requires the Official Assignee to maintain or keep books and accounts relating to bankruptcy matters. See, for example, ss 78 and 80. Thus, amongst the parties to the petition in our present case, only the Official Assignee possessed or was equipped with most, if not all, of the relevant papers and information as to whether a receiving order and an adjudication order had previously been made against the debtor as well as the stage of proof of debts at any given time. Steps could have been taken to have the petition dismissed, eg under s 6(3) of the Act. However, as stated earlier, at the hearing of the petition in the instant case in which the receiving order and the adjudication order were made, there was no representation in court on behalf of the Official Assignee to raise any objection but only to seek their setting aside subsequently on the ground that similar orders had, at the instance of another petitioning creditor, been made nearly two years earlier.

In the above circumstances, including the absence of some of the relevant documents or materials, coupled with the lack of any satisfactory explanation for the failure to advance the situation in court, and on the

clear indication that the appellant (petitioner) had acted in good faith without knowledge of the prior existing orders, we considered that the Official Assignee ought not be allowed to complain of the making of the receiving order and the adjudication order and to seek their removal on the grounds put forward. That the Official Assignee is amenable to the law of extoppel is beyond question. The case of *Re Caughey, ex p Ford* (1876) 1 Ch D 521 illustrates that if a trustee in bankruptcy, with the knowledge of the undischarged bankrupt intended to embark upon new business, permitted or consented to the latter to do so, the trustee would not be entitled in priority to the new creditors to the assets acquired by the undischarged bankrupt in the new business. Of course, the facts in *ex p Ford*, are on the converse. There it was found that the trustee had no knowledge nor consented to the bankrupt engaging in the fresh business. Referring to *ex p Ford*, Cotton LJ remarked in *Meggy v Imperial Discount Co Ltd* (1878) 3 QBD 711 at p 721:

> The doctrine, that knowledge of the dealing by the insolvent with the property left in his charge is essential to deprive the trustee of it, is adopted by Jessel MR in *ex p Ford*.

Though the two cases relate to the administration of the estates of bankrupts, the underlining principles of estoppel remain relevant. Estoppel applies to the Official Assignee.

On the materials before us, we were not convinced that the senior assistant registrar was unjustified in refusing the motion. Accordingly, we allowed the appeal and restored the receiving order and the adjudication order.

Appeal allowed.

Reported by Prof Ahmad Ibrahim